U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: DEC 6 1990

Case No.: 89-INA-289

In the Matter of:

LOMA LINDA FOODS, INC.,
Employer

on behalf of

BETTY REIDE WU,
Alien

Larry K. Sakamoto, Esquire
For the Employer

Before:Guill, Litt and Romano
Administrative Law Judges

JAMES GUILL
Administrative Law Judge

DECISION AND ORDER

This matter arises from a request for administrative-judicial review of a United States Department of Labor Certifying Officer's (C.O.) denial of labor certification.[1] Review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (AF), and written arguments of the parties. See 20 C.F.R. § 656.27(c).

Statement of the Case

Employer, Loma Linda Foods, Inc., filed an application dated May 11, 1988, seeking alien employment certification on behalf of the Alien, Betty Reide Wu. The job title on Form ETA 750 was, "Computer Programmer," and duties were listed as:

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[1] Labor certification is governed by section section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), and Title 20, Part 656, of the Code of Federal Regulations, 20 C.F.R. Part 656. Unless otherwise noted, all regulations cited in this Decision and Order are contained in Title 20, Part 656.

Program and design financial system to produce business control reports. Maintenance of the existing application system and programs to satisfy the users' requests for better business performance. Assist manager in electronic data processing, including facilitation of computer system, maintenance, changeover, and business data files management. Supply structure designed business programs to perform user friendly low maintenance cost, and error-free service. Provide daily accurate business data communications between head office and plant, offer detailed user instructions to maximize user and computer efficiency.

The only requirement for the job was a B.S. degree in Computer Science (AF 28).

Employer's final recruitment report was submitted on December 22, 1988. It indicated that 21 U.S. applicants had been considered and all rejected. Several did not have the required B.S. degree; five were no longer interested; six did not possess computer language ability for RPG; and one could not be contacted (AF 33).

On February 16, 1989, the Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification, based on findings that the requirement of RPG ability was unduly restrictive; unlawful rejection of U.S. workers for non-job related reasons; and lack of good faith recruitment (AF 23).

Employer's rebuttal, filed March 21, 1989, offered an explanation for the delays in contacting the applicants; pointed out that the Alien did possess RPG qualifications when hired; contended that a business necessity exists for this requirement; and contended that no U.S. worker meeting the requirements had applied for the job (AF 16-22).

The CO issued a Final Determination on April 4, 1989, denying certification based on findings that Employer had not made a good faith effort to recruit U.S. workers; had rejected applicants for lack of a requirement not shown on the application for certification; and had rejected qualified U.S. workers (AF 13).

Discussion and Conclusions

Fifteen U.S. applicants were referred to Employer on October 19, 1988, and six more on November 10, 1988. No action was taken to contact these applicants until December 6, 1988. The CO found that this delay of from 26 to 48 days in telephoning the applicants failed to demonstrate a good faith recruitment effort. Four applicants were found no longer available. Employer concedes that at least one of these applicants possessed the required RPG knowledge.

On rebuttal, Employer advised that its Vice President-Finance, Mr. Danny C. Villaneuva, was responsible for interviewing the applicants, but that due to the death of is father he went to Hawaii for the funeral on October 14, 1988, prior to receipt of the first referrals. He did not return for 3-1/2 weeks (AF 21). Contrary to the assertions of counsel that Mr. Villaneuva did not return until shortly before contact was actually made, Mr. Villaneuva's declaration indicates that he returned to his office about November 7, 1988. The first effort to contact the applicants was

not made until December 6, 1988. Mr. Villaneuva's explanation for this delay, other than a reference to administrative work in connection with his pending departure from the company, was a lack of awareness that a more prompt contact of applicants was necessary (AF 17).

The Board has held that an employer's undue delay in contacting U.S. applicants may indicate a lack of good faith in recruitment and result in a presumption of an intent to discourage U.S. workers in violation of section 656.21(b)(7) and section 656.20(c)(8). Benjamin Builders, Inc., 89-INA-69 (Mar. 15, 1990); Creative Cabinet and Store Fixture Co., 89-INA-181 (Jan. 4, 1990)(en banc). See also Foster Electrical Service, Inc., 88-INA-284 (June 30, 1989) (one month delay in contacting U.S. applicants unlawful where employer failed to provide valid reasons); The Velvet Turtle, 89-INA-57 (May 29, 1990) (five week delay). The reasonableness of the delay is tied to the circumstances. Creative Cabinet, supra.

While a true test of the labor pool was not achieved in this matter because of the delay in contacting applicants, the delay resulted from Mr. Villaneuva's unexpected absence from work due to the death of a family member, the fact that Loma Linda Foods was in the process of spliting [sic] into two companies with Mr. Villaneuva becoming executive vice president of the newly created La Loma Foods, his not realising [sic] the importance of contacting applicants more quickly than he did, and the fact that the recruitment period coincided with the Thanksgiving holiday season. In short, the record indicates that the delay resulted from intervening personal circumstances, unusual business circumstances, a lack of appreciation of the need for early contact of applicants, and an intervening holiday, rather than from bad faith or a purpose to discourage applicants.[2] These circumstances are analogous to those of Jacob's Engineering Group, Inc., 88-INA-367 (July 17, 1989), in which it was held that a one month delay was excusable where there were problems with the transmission of resumes, the employer's vice president of personnel had retired, and there was an intervening holiday.

Although the time gap between Mr. Villanueva's return and the first contact of applicants is not entirely explained, under the circumstances viewed as a whole we conclude that Employer should be permitted to remedy the defect in recruitment by conducting a new recruitment effort. Hence, under the particular circumstances presented, a remand to permit a second recruitment effort is necessary.

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[2] The dissent points out that the Board stated in Creative Cabinet that an employer's intent in creating an unjustified delay is irrelevant. This sentence of Creative Cabinet, however, must be viewed in context. The Board was discussing whether to apply the presumption of lack of a good faith effort to recruit based on an unjustified delay in contact of applicants. In the determination of whether the presumption is applied, an employer's intent is irrelevant: unintentional delay pollutes the recruitment process to the same degree as intentional delay. Creative Cabinet, however, provides that the reasonableness of a delay is directly tied to the circumstances. To hold that an employer's intentions are an irrelevant circumstance when assessing whether it has rebutted a presumption of lack of good faith in recruitment would be absurd.

The recruitment effort in this matter also exhibited a second defect that must be considered on remand: that is, Employer failed to state one of its job requirements in both the ETA 750A and in the job advertisement. Generally, an employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or advertisement. Universal Energy Systems, Inc., 88-INA-5 (Jan. 4, 1989); Chromato Chem, 88-INA-8 (Jan 12, 1989)(en banc). Not allowing such practice serves to prevent an employer from searching for unimportant distinguishing characteristics when reviewing applicants so that the alien can be maintained in his or her position. Universal Energy Systems, supra.

In this matter, Employer, perhaps recognizing that its failure to state RPG knowledge as a requirement in the recruitment process was going to be a problem, attempted to explain in its recruitment report the business necessity for the RPG requirement, and why, though it is willing to train a new employee, it was not willing to train a new employee on RPG computer language (See AF 33-34). This panel need not decide whether this explanation cured the failure to state the requirement in the ETA 750A or in the advertisement because a new recruitment procedure is needed based on the lack of timeliness of contact of applicants. Hence, Employer will be permitted to remedy the unstated requirement error merely by amending the application and including the requirement in any new advertising. The CO will also be permitted to consider on remand whether the newly stated requirement is unduly restrictive.

ORDER

This matter is remanded to the Certifying Officer for further proceedings consistent with the above.

At Washington, D.C. Entered: 12/6/90

by:
JAMES GUILL
Associate Chief Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with the Chief Docket Clerk, Office of Administrative Law Judges, Suite 700, 1111 20th Street, N.W., Washington, D.C. 20036. Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double spaced pages. Upon the granting of a petition the Board may order briefs.

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J. Romano, dissenting.

I dissent from the majority's remand, and would affirm the C.O.'s denial.

Employer here delayed its contact with U.S. applicants for a period of 29 days (Nov. 7, 1988 to Dec. 6, 1988). Four[1] such applicants were by then unavailable. The majority excuses this delay, essentially because the Employer did not intend to discourage any applicant (see footnote 2, pg. 4).

An Employer's actual intent, however, to discourage is "...irrelevant" per Creative Cabinets, 89-INA-181 (1/24/90), en banc, at pg. 2. The majority appears to equate the absence of actual intention to discourage with a justified or reasonable delay in contact. This confuses the presumed intention to discourage with the intention to delay the contact. Because an Employer does not intend to delay contact does not necessarily serve to rebut the presumed intention to discourage. Here, since Employer has shown no justification for its delay, the absence of intention to delay is not sufficient, of itself, to rebut the presumption of intention to discourage.

Finally, since in Jacobs, 88-INA-367 (Jul. 17, 1989), employer demonstrated that the State recruitment office was as much to blame for the total extent of the delayed contact, as it had been, our holding there is clearly distinguishable, as that type of demonstration is not present here.

In my opinion, the permit Employer a second chance to adequately test the labor pool, is to ignore the regulatory mandate to protect these four U.S. applicants who were here deprived of the opportunity to compete for this job.

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[1] Employer's "concession" that at least (only) one of these four was qualified as possessing RPG knowledge, is disingenuous since this requirement was admittedly not stated in either the advertisement or application.